No. 12,599

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES MARTIN MACINNIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

WILLIAM F. CLEARY,
57 Post Street, San Francisco 4, California,
Attorney for Appellant.

Subject Index

Table of Authorities Cited

No. 12,599

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES MARTIN MACINNIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

(In compliance with subdivision 2(b) of rule 20)

There were no pleadings in this case. It was instituted by the filing with the Clerk of the District Court two documents, one bearing the sub-title "ORDER ON CONTEMPT" and the other bearing the sub-title "CERTIFICATE IN CONFORMITY WITH RULE 42(a) FEDERAL RULES OF CRIMINAL PROCEDURE". Each of these two documents was

dated "this 28th day of February, 1950, at San Francisco, California" and was signed

"George B. Harris
United States District Judge."

Each was filed March 1, 1950. (R. 2 to 4.)

The recitals contained in the aforesaid order on contempt were as follows:

> "On the first day of February, 1950, the defendant appeared in person.
>
> "It is adjudged that the defendant is guilty of contempt of court for misconduct during the judicial proceeding in United States v. Harry Renton Bridges, Henry Schmidt and J. R. Robertson, No. 32117-H, as *specified in the accompanying certificate.**
>
> "It is ordered that the defendant appear before this Court for sentence upon the termination and conclusion of the trial stages in United States v. Harry Renton Bridges, Henry Schmidt, and J. R. Robertson, No. 32117-H.
>
> "It is further ordered that the Clerk deliver a certified copy of this Order on Contempt and the accompanying Certificate to the United States Marshal or other qualified officers." (R. 2.)

The recitals contained in the aforesaid certificate were as follows:

> "In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for

*All emphasis in this brief added by appellant.

criminal contempt was committed in my presence and was seen and heard by me during a session of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:

"On the morning of Wednesday, February 1, 1950, following the examination by counsel for defendant and counsel for the Government, of the witness, Father Paul Meinecke, the Court had occasion to interrogate the witness. After propounding several questions, the Court asked a proper and pertinent question, directed toward the physical well-being of the witness, to wit:

"Q. Have you been recently subjected to medical treatment, Father?

"(Tr. p. 4794, lines 20-21.)

"Following such question, Mr. MacInnis jumped to his feet, participated in a critical remonstrance of the Court, at the conclusion of which he stated to the Court in a belligerent manner in the presence of the jury, to wit:

"Mr. MacInnis. I think you should cite yourself for misconduct.

"The Court. Ladies and gentlemen——

"Mr. MacInnis. I have never heard anything like that. You ought to be ashamed of yourself.

"(Tr. p. 4796, lines 2-6.)

"The entire record of the testimony of Father Paul Meinecke, designated Exhibit A, is attached hereto, and is made a part of the Certificate." R. 3 and 4.

Thereafter, to wit **on April 4, 1950,** there was filed a second "ORDER ON CONTEMPT" which between

the title of the court and the title of the case contained these words:

"NO. 32117-H
Title 18, U.S.C. 401 (1)"

The body of said second order on contempt reads as follows:

"On the *4th day of April, 1950,* the defendant appeared in person.

"The Court *having* heretofore *on the twenty-eighth day of February, 1950,* duly and regularly adjudged James Martin MacInnis guilty of contempt of this Court and the matter of judgment and sentence having been stayed and deferred until the conclusion of the trial stages;

"It is adjudged that the defendant is sentenced to serve three (3) months in an institution to be designated by the United States Attorney General or his authorized representative.

"It is ordered that the Clerk deliver a certified copy of this order on contempt to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

"**April 4th, 1950.**

"/s/ George B. Harris,
United States District Judge."

It is apparent from the above that the District Court *claimed* jurisdiction to adjudge appellant guilty of contempt of court and to sentence him to three months imprisonment under Title 18, U.S.C. 401 (1) and Rule 42 (a) Federal Rules of Criminal Pro-

cedure. [One of the points made on this appeal is that the District Court lost jurisdiction to punish appellant for the asserted contempt of February 1, 1950 by not proceeding at once, that is "**summarily**", to punish appellant.]

Within the time required by Rule 37, Federal Rules of Criminal Procedure subsequent to the sentencing of appellant (to wit on April 12, 1950 or 8 days subsequent to the pronouncement of said sentence) a notice of appeal was filed in the District Court. (R. 74 and 75.) This court has jurisdiction of the appeal under Title 28 U.S.C. Section 1291.

II.

STATEMENT OF THE CASE.

(In compliance with subdivision 2(c) of Rule 20)

As hereinbefore shown, this is an appeal from a judgment and sentence of criminal contempt, summary in form (in that there was no notice and hearing or opportunity to be heard in the District Court). The questions involved were raised for the first time in the "Statement of Points to be Relied Upon on Appeal" filed in the District Court April 13, 1950 (R. 76 and 77) and were restated in slightly different words in the statements of Grounds To Be Relied Upon On Appeal filed in this court September 26, 1950. Briefly, they are as follows:

(1) That none of the matters set forth in the certificate of contempt either singularly or collectively constitutes contempt.

(2) That the District Court lost authority and jurisdiction to punish appellant under Rule 42(a) Federal Rules of Criminal Procedure before, and long before, it undertook to impose punishment upon appellant.

(3) That because the District Judge did not certify that the conduct of appellant disrupted, threatened to disrupt or tended to disrupt, or, even, was intended to disrupt the orderly process of the court, the District Judge did not have authority or jurisdiction to "summarily punish" appellant under Rule 42.

(4) That the *record of the proceedings at the time of the pronouncement of sentence and judgment* show that the sentence of three months imprisonment was imposed not solely because of the alleged acts of contempt recited in the certificate but was imposed in **inseverable part** *as punishment for unidentified and unspecified acts of appellant* **concerning which no certificate in conformity with Rule 42(a) Federal Rules of Criminal Procedure was made or filed** and that the District Court had no authority or jurisdiction to impose a punishment on appellant under Rule 42(a) aforesaid which was, either in its entirety or in inseverable part, *for acts concerning which no certificate in conformity with Rule 42(a) aforesaid had been made and filed.*

(5) That the sentence of three months' imprisonment is excessive.

III.

SPECIFICATION OF ERROR.

1. The United States District Court and the Judge thereof erred in adjudging appellant to be in contempt of court.

2. The United States District Court and the Judge thereof erred in adjudging appellant to be in contempt of court under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure twenty-eight days subsequent to the day on which the conduct of appellant so adjudged to constitute contempt, occurred.

3. The United States District Court and the Judge thereof erred in imposing punishment on appellant, under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure sixty-two days subsequent to the day on which the conduct of appellant, adjudged to constitute contempt of court, occurred.

4. The United States District Court and the Judge thereof erred in imposing punishment on appellant, under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure in inseverable part for unspecified and unidentified acts of appellant concerning which no certificate, as required by Rule 42(a) Federal Rules of Criminal Procedure, was ever filed.

5. The United States District Court and the Judge thereof erred in adjudging appellant to be guilty of contempt of court under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure for conduct which was not certified by said judge to have been conduct which disrupted or threatened to disrupt or tended to disrupt the orderly process of said court.

6. The United States District Court and the Judge thereof erred in imposing a sentence on appellant of such length of imprisonment as, under all of the circumstances of the case, was excessive to the point of being vindictive and oppressive.

IV.

SUMMARY OF BACKGROUND FACTS.

In addition to the facts hereinbefore mentioned, the background facts of the case are as follows:

The asserted acts of contempt occurred during the course of a criminal trial in which appellant was appearing as counsel for two of the three defendants. The charges against the three defendants were, in substance that the defendant Bridges had committed perjury in testifying in a naturalization case that he was not and had not been a member of the Communist Party, that the other two defendants had aided and abetted him in the commission of such perjury and that the three had conspired to have the defendant

Bridges defraud the government of the United States by committing such perjury.

The trial of said criminal case commenced on November 14, 1949 and ended on April 4, 1950. The asserted contempt occurred on February 1, 1950, during the early stages of the presentation of the Defense case and while Father Paul Meinecke, a Roman Catholic Priest, was on the stand as a character witness for the defense.

Father Meinecke had testified that he had been stationed in San Francisco for a period of about ten years commencing in 1936 or 1937, and while in San Francisco had been the organizer of The Association of Catholic Trade Unionists, an instrument of the Roman Catholic Church organized specifically at the wishes of Pope Pius XI [to combat Communism in labor unions (R. 44)]. That during those ten years he had been in close contact with the defendant Bridges and had discussed Bridges with many persons and that in his opinion Bridges was not only a truthful, honest, and upright man, but he was more, and that he would not publicly be known as a very good friend of Bridges had he the slightest doubt of his character (R. 5 to 11).

On cross examination he testified that he had heard rumors that Bridges was a Communist and had made it his business to investigate that very thing, that in his opinion Bridges was not a Communist but only a militant trade unionist and that if he had "the slightest notion" or "any suspicion whatsoever" that

Bridges was a Communist, he would not be there as a witness for Bridges or a friend of Bridges (R. 15, 16) and that his opinion concerning Bridges' character was largely dictated by public opinion, that is the opinion of others, their estimation of the man (R. 22, 23).*

As soon as the cross examiner stated that he had no further questions Judge Harris undertook to cross examine Father Meinecke and it was during the cross examination of the priest by Judge Harris that the asserted act of contempt occurred.

V.

ARGUMENT.

APPELLANT'S FIRST POINT.

NONE OF THE MATTERS SET FORTH IN THE CERTIFICATE OF CONTEMPT, EITHER SINGULARLY OR COLLECTIVELY, CONSTITUTE CONTEMPT.

When defense counsel, during the course of a criminal trial, and in the presence of the jury, says to the judge presiding, "You should cite yourself for misconduct. * * * I have never heard anything like that. You should be ashamed of yourself.", every *appearance* of contempt of Court is present. Yet, as we all

---

*In view of the charges against the defendants and in view of the known stand of the Roman Catholic Church with respect to Communism and Communists this testimony of Father Meinecke "was", as we say later in this brief, "like the testimony of a recording angel in favor of a person on trial for a heresy which he denied".

know, *appearances are often deceiving.* It is so in this instance.

The statements of appellant above quoted, and set forth in the certificate of U. S. District Judge George B. Harris as the act of contempt for which the punishment is imposed on appellant, did not constitute an act of contempt of Court but were, in all particulars, pertinent and proper. By this we mean several things. (1) We mean that Judge Harris should have cited himself for misconduct. (2) We mean that Judge Harris should have been ashamed of himself. (3) And we mean that appellant was not only within his rights, but was compelled by his duty as counsel, to call the two foregoing facts to the attention of *both the Court* and the jury, and to do so in *forceful and unmistakable language.*

To show that these things are so, we must explore the transaction in some detail along several separate but converging avenues, and along several crossroads which tie those converging avenues together at various distances from the point of convergence.

ONE.

Let us begin this exploration by examining one of the recitations made by Judge Harris in the certificate which he signed and filed, and which forms a part of the judgment.

It is as follows:

> "* * * After propounding several questions, the Court asked a *proper and pertinent question, di-*

rected toward the physical well-being of the witness, to wit:

'Q. Have you been recently subjected to medical treatment, Father? * * *' "

It will be observed that the portions of this recitation which we have emphasized constitute an *expression of opinion* on the part of Judge Harris, and *are self-serving in nature,* that is, that they are designed to exculpate Judge Harris from any error, fault, or blame in the asking of the quoted question and to highlight the remarks of appellant in such a way as to indicate that those remarks were absolutely inexcusable.

If, by the term *"physical well-being",* Judge Harris intended to convey the thought of *bodily health* as distinguished from *mental health,* this recitation in the certificate is *demonstrably false,* or, in other words, it is not only not supported by the record, but the record, and particularly the record of Judge Harris' own words, *prove* that it is false.

(It should here be stated that whether the question was directed toward the *bodily health* or the *mental health* of Father Meinecke is of vital importance. That this is so will be hereinafter shown.)

First: observe that the quoted question, directed as it was to *a character witness* in a criminal trial, would have been *both irrelevant and immaterial,* and, therefore, *neither proper nor pertinent,* if it were directed toward the bodily health, *as distinguished from the*

mental health, of the witness. This is to say: the *mental health* of the witness would have had a bearing on the credibility of the witness, on the trustworthiness of his testimony, whereas the *bodily health* of the witness could have had **no** bearing *either on that subject or upon any other possible issue of the case.*

From this we see that the recital of Judge Harris that the question was "a proper and pertinent question" is in conflict with the further recital of Judge Harris that the question was "directed toward the physical well-being of the witness" *if* Judge Harris, by the term "physical well-being", intended either to exclude, or to ignore, or to point away from, or even to encompass anything other than, the **mental health** of Father Meinecke.

Second: observe the word **"subjected"** in the quoted question, viz.: "Have you been recently **subjected** to medical treatment, Father?"

The word "subjected" is derived from the two Latin words meaning *under* and *throw.* It means: "to **make subject** *to some action or agent.* To *expose to the operation of some law or agency.* To place before for consideration **and disposition. To subdue.** To lay or spread before; **place beneath.**" Funk & Wagnall's Desk Dictionary.

A person who, of his own volition, goes to a physician for diagnosis and treatment is not being **"subjected"** to medical treatment. Persons who have bodily as distinguished from mental ills are not normally **subjected** to medical treatment. Conversely,

persons who are suffering mental illness are frequently **subjected,** *by the will or compulsion or coercion* **of others,** to medical treatment.

Thus the word **"subjected"** in the quoted question had a connotation pointing in the direction of *mental* illness rather than in the direction of *bodily* illness.

Third: the record discloses that the four questions immediately preceding the quoted one about recent medical treatment were all directed toward the state of Father Meinecke's *memory* and *orientation.* The record in this respect reads as follows:

"The Court. **Now, to what other extent did your memory** (4793) **become refreshed by your conversation with Mr. MacInnis?**

A. I was trying—I know that questions would be asked of me and I wanted to try to be direct and factual and to the point and not hedge. So the first thing we had to agree on was what year I first got to know Harry Bridges, and then——

Q. **Do you have difficulty, Father, with your memory or recollection under ordinary conditions?**

A. In Nevada there are no clocks and no calendars. We don't know one day from another, and it is easy for one to become careless about pegging dates, although I wasn't that way when I was here in San Francisco.

Q. **In San Francisco, Father, you were perfectly conversant and well oriented, weren't you, with respect to dates and the like?**

A. That's right.

Q. **Since you went to Nevada your orientation has become poor, has it?**

A. No; the years have sort of run together. I say a couple of years ago, and then I remember back, it was 15 years ago."

(R. 32-33.)

From the sequence and context of that portion of the record above quoted, it is unmistakably indicated that the question about recent medical treatment *was* **a continuation** of the subject dealt with in the preceding four questions, that is, that it was directed toward the state or condition of Father Meinecke's **mind.**

Note: that, in the questions and answers above quoted, it was Judge Harris and not Father Meinecke who **injected** and repeated the word "oriented" and "orientation", thereby *suggesting* that Father Meinecke was *mixed up and confused mentally;* that the question, *"Since you went to Nevada your orientation has become poor, has it?"* was in form and substance in the nature of an *accusation,* being *converted* into a question only by the terminal phrase "**has it.**"; and, that the word *"subjected"* in the question about recent medical treatment carried forward the same *accusation* and renewed and fortified the implication and innuendo of the words *"oriented"* and *"orientation."*

Fourth: we call attention to the fact that between the question and the quoted remarks of appellant which Judge Harris has adjudged to constitute contempt more than a page of transcript occurs and that a part thereof reads as follows:

"The Court. There is no impropriety in my questioning.

Mr. MacInnis. I say there is.

The Court. He **asserted*** his present *memory* is not good. I asked him whether or not **his recollection** was good while he was here years ago. He said yes, it was years ago. **I don't see any reason for the criticism.**" (R-34.)

The latter statement by Judge Harris was made within a minute, (or, at most, a minute and a half), of the time he completed the question about being recently subjected to medical treatment, **and it was made in justification of the asking of that question.** Do not the words "**memory**" and "**recollection**" **unmistakably reveal** that, **so soon** after the quoted question was asked, Judge Harris **was thinking of it** *as a question directed toward the state of Father Meinecke's* **mind?**

Fifth: later the same day (after a mid-morning recess), Judge Harris made a statement to the jury (which we hereinafter call an apology) concerning his purpose in asking the quoted question. During the course of that statement, or apology, Judge Harris said:

"Latterly, in my examination of Father Meinecke some mention was made by counsel concerning the asserted impropriety of a question on my part to the Father. I might say to you that that was not born of any desire on my part, nor was it designed to inquire into Father Meinecke's

*Father Meinecke made no such **assertion.**

mental processes. Nor was it to reflect upon his integrity. *The question was born and conceived out of a desire on my part to accord fairness to the witness, for the reason that mention was made during the course of this testimony that he left San Francisco for Nevada; an inference might be drawn from that departure that it had something to do with activities in trade unionism and the like.* The Father on the witness stand volunteered that he asked to be transferred. I merely wanted to inquire, ladies and gentlemen, a very simple question, *not born of curiosity on my part, but born of a desire to provide you with all the facts surrounding the Father, and it was to the end that I might inquire as to his health. Very many people have to leave large metropolitan areas to go to less burdensome parishes and that was the reason underlying my question.*"

(R. 38-39.)

The foregoing explanation will bear painstaking analysis.

A. Note the clause, *the positive statement:* "The question *was* born and conceived out of a desire on my part to *accord fairness* to the witness, * * *"

This statement unmistakably implied that the testimony of Father Meinecke, *as it then stood,* gave the jury *ground or reason* to look upon Father Meinecke *in an unfavorable light* and that the question [about being recently subjected to medical treatment], was designed to *accord* to Father Meinecke the opportunity to supply an *omitted fact,* which, when supplied, would explain or qualify or excuse or account for his

other testimony in such a way *as to cause the jury to look upon him in a more favorable or less unfavorable light.* In other words, this statement unmistakably implied that the question was intended to enable Father Meinecke *to remove or reduce* a possible or likely *misconception* about him, *arising from his testimony,* which, unless removed or reduced, *would unfavorably reflect upon him;* and which *could be removed or reduced* by a showing that he either had or had not recently been subjected to medical treatment.

In what *possible* way could a showing that Father Meinecke **either had or had not** bodily, as distinguished from mental ills, have explained or qualified or excused or accounted for his other testimony in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Meinecke **either had or had not** bodily, as distinguished from mental ills, have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

We submit the answer to each of these questions is **"in no possible way."**

In what *possible* way could a showing that Father Meinecke *was* **not** *mentally ill* have explained or qualified or excused or accounted for his other testimony, in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Mein-

ecke was not mentally ill have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

We submit the answers to each of these questions is "in no possible way."

There remains but one more alternative. In what *possible* way could a showing that Father Meinecke was mentally ill have *explained* or *qualified* or *excused* or *accounted* for his other testimony in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Meinecke was mentally ill have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

The answer to these two questions is not "in no possible way" but is "in *one, and in* only *one,* possible *way*" namely: If Father Meinecke was shown to be mentally deranged, and particularly if he was shown to be mentally deranged on the particular subject of his testimony, then he was not to be *considered or held to be* morally responsible *for the testimony which he had given in favor of the defense.*

This, we assert, is the only possible way in which an inquiry concerning either the physical or mental health of Father Meinecke could have accorded fairness to that witness. *In this respect we challenge the*

attorneys for the government to suggest any other possible way, having the least smidgeon of plausibility, in which such an inquiry could have accorded fairness *to Father Meinecke.*

Observe, that if this was the thought which Judge Harris had in mind, then, at this middle stage of the trial, he had made up his mind either (1) that the defendants were guilty of the crimes charged against them or (2) that, whether guilty or innocent, they should (for patriotic reasons) be convicted.

To say this in another way: if this was the thought which Judge Harris had in mind, then he intended, by the quoted question and by his explanation of his purpose in asking it, to tell the jury, in effect, that *if Father Meinecke was not mentally deranged he was culpable—i.e. deserving of blame or censure*—for having given the testimony which he had theretofore given (*in which case his testimony, being that of an evil person, should be disregarded*) whereas *if he were mentally deranged he should be excused for having so testified* (*but in such case his testimony, being that of a person who was mentally irresponsible, should be disregarded.*)

Thus: If this was the thought which Judge Harris had in mind, he was trying, by the asking of the quoted question and by his explanation of his purpose in asking it, *to induce the members of the jury to reject, for one reason or another but definitely to reject, the testimony favorable to the defense which Father Meinecke had given.*

B. But is it not possible that when Judge Harris said: "The question was born and conceived out of a desire on my part to accord fairness to the witness, * * *" he, Judge Harris, was merely "flowing at the mouth," that is, speaking words without reason behind them?

Were this the only instance of this kind we would admit to such a possibility. But this was *not* the *first time* Judge Harris, in his apology to the jury, used the word *"fairness"* with respect to the same witness, and, in the previous instance, the word "fairness" was used in such a way to to imply that a **stigma or onus** *attached to a person who appeared* **voluntarily** as a witness for the defense in the Bridges case, and thus, in that previous instance, Judge Harris *evidenced the* **same** *character of prejudice and prejudicial purpose as that previously outlined by us.*

We have reference to the following incident:

The first question which Judge Harris asked Father Meinecke was this:

> "Did you receive a subpoena to attend this court?"
>
> (R. 31.)

The answer was in the affirmative.

Judge Harris in his "apology" stated to the jury his purpose in asking such a question as follows:

> "* * * I think the first question I asked him was whether or not he was subpoenaed. That was overlooked. *I think in fairness to Father Mein-*

ecke it was a question that should have been asked, *showing his purpose in coming here.* * * *''
(R. 37-38.)

In what way *could* the asking of that question have been an act *"in fairness to Father Meinecke"?* In what *conceivable way could* an answer to that question have relieved Father Meinecke of the onus of any thought or inference or suggestion *which would have been* **unfair** *to him*—that is, which if unremoved would have reflected unfavorably upon him?

There is only one *possible plausible* answer to these questions. *And we challenge the attorneys for the Government to suggest any other answer which is in the least bit plausible.* The answer is this: that some onus or stigma attached to a person who came forth **voluntarily** to give testimony favorable to the defendants then on trial, and that by asking Father Meinecke whether he had been subpoenaed, Father Meincke was given the opportunity, **which in fairness should have been given to him,** *to relieve himself of that onus or stigma by testifying that he was present* **under the compulsion of subpoena.**

Think this over. Examine it from every side and corner and angle and point. And when you are done, no other possible answer containing the least figment of plausibility will have occurred to you.

C. Let us go a step further to show that Judge Harris had Father Meinecke's mental health in mind when he asked the quoted question about recent med-

ical treatment. Consider this part of Judge Harris' apology to the jury:

> "* * * Very many people have to leave large metropolitan areas to go to less burdensome parishes, and that was the reason underlying my question."

Do very many people have to leave large metropolitan areas for less populous communities *to obtain more or better medical care and treatment?* Of course not. The very reverse is the case.

On the other hand, it is a matter of common knowledge that some few people—not *very many,* and not even *just plain many,* but *some few,* who have the means to do so—who suffer from *mental or nervous disorders,* leave, or are sent from large metropolitan areas to less populous communities so that they may there live less exciting lives—lives which are less taxing upon their mental and nervous resources; that is, where they will find a **less burdensome** daily routine.

Before we leave the matter of this sentence of Judge Harris' apology to the jury let it be noted that **clergymen** rather than **parishioners** find **parishes** either **more burdensome** or **less burdensome,** and that, as a result, when Judge Harris said "very many people", he meant either very many clergymen, or, more probably, *very many Roman Catholic priests.* He thus singled out the class to which Father Meinecke belonged, and, in effect, told the jury that **very many**—*not just some, and not just many, but* **very**

many—of the members of that class were mentally ill.*

In other words, in this instance Judge Harris told the jury, in effect, and by unmistakable suggestion and innuendo, that *very many clergymen,* or **very many Catholic priests,** *were of unsound mind,* and that, *in all probability,* **Father Meinecke was one of those very many.** That was the patent suggestion. This was the unmistakable innuendo. *And it impugned the sanity of clergymen, or of Roman Catholic priests, as a class.*

D. Here we find it advisable to retrace a bit in order to explore one of the "side streets" previously mentioned by us. By side streets we mean: matters which, on casual glance, appear to be irrelevant but which, on closer examination, are revealed to be not only relevant but quite material.

As we have hereinbefore shown, Judge Harris, in his apology to the jury, said:

> "* * * The question (concerning having been recently subjected to medical treatment) was born and conceived out of a desire on my part to accord fairness to the witness, *for the reason that mention was made during the course of this testimony that he left San Francisco for Nevada; an inference might be drawn from that departure that it had something to do with activities in*

*Are the facts such as to have warranted a declaration of "judicial knowledge" to this effect? We unhesitatingly assert that they are not.

*trade unionism and the like. The Father on the witness stand volunteered that he had asked to be transferred. * * *"*

How, by what logical process, could it be inferred, from the fact that Father Meinecke had left San Francisco for Nevada, that that *departure* had *something* to do with activities in trade unionism and the like?

In no way. By no logical process.

And in what way could testimony that Father Meinecke *either had or had not* "been *recently subjected to medical treatment"* have *either fortified or lessened, in any degree,* an inference that his departure from San Francisco or to Nevada *either had not or "had something* to do with activities in trade unionism and the like?"

In no way. In absolutely no way.*

Thus, on casual examination, the last quoted statements of Judge Harris appear to be without point or reason, to be *non sequitur,* to be unrelated and irrele-

---

*Father Meinecke's departure from San Francisco apparently occurred several years prior to February 1, 1950 and in 1946 or 1947 in that he had testified that previous to the last few years he had been in San Francisco (R. 5) and that he came to San Francisco in 1936-37 and remained there approximately ten years. (R. 5 and 6.) He testified on February 1, 1950. Thus medical treatment at or prior to the time of his departure from San Francisco, would not have been *recent.* Moreover, whether Father Meinecke had ever received medical treatment would have had no bearing on whether his departure from San Francisco "had *something* to do with activities in trade unionism and the like".

vant. But let us take a second look, a closer look, a deeper look. *And when we do we will find point and reason and relation and relevance* **aplenty.**

The clue is to be found in the sentence, "The Father on the witness stand *volunteered* that he had asked to be transferred." It is the clue because it points us unerringly to the portion of the record which Judge Harris had in mind, viz.:

> "Q. (By Mr. Donohue). Father, are there trade unions up in Eureka, Nevada, where you are now stationed?
>
> A. Unfortunately, the present policy of Washington is that no mining is to be done in the Western United States. Our mines are closed. There are no jobs. My poor little parishes are suffering. So where there are no mines operating, there are no workers, there are no unions.
>
> Q. I was wondering whether there was any reason, after your ten years' experience with the trade union movement, for your being assigned to an area in which there is no trade union movement at all.
>
> A. A very interesting question. No connection whatsoever, and I forgive you for the slur.
>
> Q. I didn't ask for forgiveness, and I meant no slur. I asked you a question. You understand that this is a court of law. (4787)
>
> A. Yes sir. My superiors always gave me loyal backing and approval and urged me to take an interest in the trade union movement and in the problems and knowing these people and being helpful to them. My superiors approved of that fully and gave me full encouragement.

Q. And it was your superiors who moved you to Eureka, Nevada?

A. No, I requested it. The records show that." (R. 26, 27.)

In view of this testimony, and in the absence of any evidentiary showing to the contrary, [and there was no evidentiary showing to the contrary], there was *absolutely no basis* for an *inference* that Father Meinecke's departure from San Francisco, to Nevada, "had something to do with activities in trade unionism and the like."

It is true, unmistakably true, that Mr. Donohue, by his four questions, tried to plant such a thought in the minds of the jury, *not only as being a possibility but as* being an actuality. But Mr. Donahue's questions *did not constitute evidence* to serve as basis for an inference such as Judge Harris, in his apology to the jury, said *"might be drawn";* and the evidence, the only evidence, on that subject was diametrically opposed to the drawing of such an inference.

Judge Harris, in stating to the jury that such an inference *"might be drawn", in practical effect* elevated the assertions and suggestions contained in the questions of Mr. Donohue to the level of evidence. Such statement, in effect, told the jury *that there was evidence before them sufficient to sustain such an inference.* And what was that inference. That Father Meinecke *had been moved* from San Francisco *to Nevada by his superiors because of his "activities in trade unionism and the like."*

E. Now consider this inference, *which Judge Harris told the jury they might draw,* in connection with the suggestion and innuendo of Judge Harris with relation to probable insanity of Father Meinecke, as being parts of "**all the facts** surrounding the Father" with which Judge Harris said **he desired "to provide"** the jury.

What do we find?

We find the suggestion—subtle, it is true, but clearly present—that Father Meinecke was, by his superiors, transferred from San Francisco to Nevada because, *in their judgment,* he had the irrational thought or insane delusion that Harry Bridges and other left-wing labor leaders in San Francisco (which they, the superiors of Father Meinecke, deemed to be Communists or fellow travelers of Communists) were not in fact Communists or fellow travelers of Communists but were only *militant trade unionists.** We find the suggestion that the *superiors of Father Meinecke found him to be* **mentally cracked** *and* **talkative on this one subject** and that they removed him from San Francisco, where he could do great injury (by expressing his opinions on this subject) to the crusade which the Roman Catholic Church was making against Communism and Communists, and **exiled him** to the ghost mining camps, mountains and deserts of Nevada, there to minister to sheep herders and Indians, where his talking about "trade unionism and the like" could do no harm.

---

*Father Meinecke had testified that in his opinion Bridges was merely a militant trade unionist. (R. 16.)

Be it observed that this explanation of the inference which Judge Harris said "might be drawn" fits in perfectly with and fortifies and furthers the explanation which we have given concerning the way in which inquiry concerning the mental health of Father Meinecke *could accord fairness* to Father Meinecke, and that both of these explanations fit in perfectly with and fortify and further the explanation which we have given concerning the way in which the inquiry as to whether Father Meinecke was subpoenaed *could accord fairness* to Father Meinecke. The course of Judge Harris in these respects *was as consistent as it was persistent, and it was closely knit.* This persistency and consistency and close knitting combine to negative, as a possible explanation, the thought that Judge Harris was merely bumbling and stumbling through words the meanings and implications of which he did not comprehend; they combine to negative, as a possible explanation, the thought that there was present merely an unfortunate series of slips of either mind or tongue. **Purpose—calculated purpose—is unmistakably revealed.**

F. And what was that purpose? To answer this in the fullness which it deserves we must consider the background.

The Roman Catholic Church is notoriously known to be an implacable and vociferous foe of Communism, Communists, and everything and everyone having a tendency in that direction. The gravamen of the charge against the defendants was that Bridges was a member and active agent of the Communist

Party. Father Meinecke was a Roman Catholic Priest. For ten years he had headed in San Francisco the Association of Catholic Trade Unionists. The Association of Catholic Trade Unionists was an instrument of the Roman Catholic Church organized specifically at the wishes of Pope Pius XI (R. 8) to combat Communism in labor unions (R. 44). Father Meinecke had, during those ten years, been in close contact with Bridges. He had heard the rumors and such that Bridges was a Communist. He had made it his business to investigate that very matter to get the truth of it (R. 14). He had discussed Bridges with many persons who knew him at close range and were not basing their judgments of the man on hearsay and the like. Based on such discussions and his own studied judgment he testified he knew the general reputation of Bridges in San Francisco for truth, honesty and integrity and that it was good. *On cross-examination* it developed that Father Meinecke was of the opinion that Bridges was not a Communist but merely a militant trade unionist (R. 16). In answer to a question *on cross-examination* he testified:

> "Mr. Donohue, *as a Catholic priest, if I had the* **slightest** *notion that Harry Bridges was a Communist,* **I would not be here.** *If I had* **any suspicion whatsoever** *that he was,* **I would not be sitting here or his friend."** (R-16)

This testimony of Father Meinecke was like a bomb exploding in the heart of the prosecution's case. *It was like the testimony of a recording angel in favor of a person on trial for a heresy which he denied.*

Unless in some way discredited, it did great and inestimable damage to the case of the prosecution.

And what was the revealed purpose of Judge Harris? *To discredit that testimony.* To destroy it in the minds of the jury. To deprive the defendants of its benefit. And to do so, not by any attack upon the honesty or sincerity of Father Meinecke, but by telling *the jury, in effect, that among the facts "surrounding the Father"* which he, Judge Harris, *had a "desire to provide" to them,* was the fact that Father Meinecke was crazy at least on the one subject, the particular subject, on which he testified; *and that it was because his superiors had years before discovered that he was crazy on this one subject that he was now stationed in Nevada rather than in San Francisco.*

G. Particular attention should be given to this sentence in Judge Harris' apology to the jury:

> "I merely wanted to inquire, ladies and gentlemen, a very simple question, *not born of curiosity on my part, but born of a desire to provide you with all of the facts surrounding the Father,* and it was to the end that I might inquire as to his health."

The clause "not born of curiosity on my part" in juxtaposition to the clause "but born of a desire on my part to *provide you* with all *of the* facts *surrounding the Father"* clearly and unmistakably implied that Judge Harris *knew what all of the facts were surrounding the Father and had no reason to be curious.* In other words these two clauses gave to the

suggestion and innuendo of Judge Harris that Father Meinecke was of unsound mind the practical effect *of unsworn but positive testimony of Judge Harris* that Father Meinecke was *in fact,* to Judge Harris' knowledge, *of unsound mind.*

Now let us get back to the Certificate of Judge Harris. We have heretofore said,

> "If by the term 'physical well-being' Judge Harris intended to convey the thought of bodily health, as distinguished from mental health, this recitation in the Certificate is demonstrably false, or, in other words, it is not only not supported by the record but the record, and particularly the record of Judge Harris' own words, proves that it is false."

We think we have shown to the point of demonstration, in the sections which we have designated *First* to *Fifth* and under *Fifth* have lettered A to G, that Judge Harris had Father Meincke's mental health, as distinguished from his bodily health, in mind when he asked the question about recent medical treatment.

TWO.

Now the question arises: Did Judge Harris make the statement, "directed toward the physical well-being of the witness" in the Certificate with the idea of inferentially denying that the question was directed toward the mental health of Father Meinecke?

Could such declaration in the Certificate have served *any purpose* had it not been intended *to point away*

from the question of mental health? We can think of no such purpose.

Conversely, if such declaration were intended to point away from the question of mental health, we can think of a very important purpose which such a declaration could have served.

The following appears on pages 80 and 81 of the Record:

"(Title of District Court and Cause.)

EXCERPTS FROM THE TESTIMONY IN NO. 32117-H

UNITED STATES OF AMERICA VS. HARRY RENTON BRIDGES, HENRY SCHMIDT AND J. R. ROBERTSON.

Before: Hon. George B. Harris, Judge.

Wednesday, December 21, 1949

Paul Crouch

witness for the Government.

Cross-Examination

By Mr. Hallinan:

* * * * * * *

Q. Have you been in any institution for nervous or mental disorders?

Mr. Donohue. Oh, I object, if Your Honor pleases. That is a wholly improper question.

Mr. Hallinan. It is entirely proper to find out of this witness' mental background.

Mr. Donohue. *There is a rule of law,* if Your Honor pleases, *that no witness may be asked any question the answer to which may tend to degrade him. That is the only purpose for which this shot in the dark could be asked of this witness by Mr.*

Hallinan. After all, a witness is entitled to some consideration.

The Court. *The* objection is sustained. (Emphasis added.)

* * * * * * *

Thursday, January 12, 1950.

Lewis Herbert Michener, Jr.,

witness for the Government.

Cross-Examination

by Mr. MacInnis:

Q. Do you know a man named Dr. Ernest Cohen?

A. I believe I do, sir. I do know a doctor by that name.

Q. He is a psychiatrist in Beverly Hills, isn't he?

A. That's correct, sir.

Q. And he has treated you for mental illness in 1944, hasn't he?

Mr. Paisley. Oh, Your Honor——

The Court. The objection is sustained.

* * * * * * *"

(R. 80-81.)

Observe that the Crouch ruling occurred approximately five weeks prior to Father Meinecke's appearance on the witness stand, and that the Michener ruling occurred just over two weeks prior to Father Meinecke's appearance on the witness stand.

From the foregoing, we see that if Judge Harris' question to Father Meinecke about recent medical treatment was directed toward the mental health of

Father Meinecke, *Judge Harris asked that question* **in disregard and defiance of his own previous repeated rulings.** We have hereinbefore shown that Judge Harris' question to Father Meinecke about recent medical treatment was directed toward the mental health of Father Meinecke.

Moreover, that question was asked by Judge Harris not only in disregard and defiance of his own previous repeated rulings, but he was asking that question of **a defense witness** where he had, by such previous rulings, prevented defense counsel, **including appellant,** from asking the same character of question of **prosecution witnesses.**

Nor is this all. Such rulings were to the effect that such a question was improper because **"the answer * * * might tend to degrade" the witness,** and that the *"only purpose for which" such a question* **"could** *be asked" was to obtain an answer which* **would degrade the witness.** We say that this was the effect of those previous rulings because in the first, or Crouch, incident, Judge Harris said **"The** objection is sustained"; because the **only** objection made in that instance *was to the above stated effect;* and, because in the second, or Michener, incident, Judge Harris sustained **"the** objection" without the "objection" having been stated, *except as it was stated in the Crouch incident.*

Here we need to explore another of the converging avenues to reveal the full effect of such—shall we say—inconsistency on the part of Judge Harris.

On November 22, 1949, during the early stage of the same trial, Judge Harris adjudged Vincent Hallinan guilty of criminal contempt of Court, and sentenced him to six months' imprisonment. (R. 83.)

Said judgment of contempt was appealed to this Court. (R. 84). This Court affirmed that contempt judgment. (*Hallinan v. U.S.A.*, 182 Fed. (2d) 880.) The criminal contempt in that case consisted of making statements and asking questions assertedly in disregard and defiance of previous rulings of Judge Harris during the trial of the case of *U. S. v. Bridges et al.*

Thus, under the precedent set by Judge Harris in adjudging Vincent Hallinan guilty of contempt of Court (as later sustained by this Court), *Judge Harris was* **himself** *guilty of* **criminal contempt of court** in asking Father Meinecke the question about recent medical treatment **if** that question was directed toward the *mental health* of Father Meinecke.* As we have seen, that question was so directed.

In other words, **if** the declaration of Judge Harris in the Certificate that the quoted question to Father Meinecke was "directed toward the physical well-being of the witness" was intended by Judge Harris to point away from the question of mental health, *the purpose which could have been served thereby was to*

*That is, if, in this situation, "sauce for the goose is sauce for the gander". In this respect we say that in our judgment, the responsibility, and therefore in the event of a failure to discharge the responsibility, the culpability, of the judge is greater than that of the advocates.

set up a judicial finding or a pronouncement, contrary to the truth, *to prevent appellant from showing,* in his own defense upon this appeal, *the fact of misconduct and criminal contempt of court, and the extent of misconduct and criminal contempt of court, of Judge Harris* in asking the quoted question of Father Meinecke.*

THREE.

Now let us again return to the Certificate of Judge Harris.

Attention is called to the fact that the Certificate does not quote what occurred between the asking of the quoted question by Judge Harris, and the making of the statements by appellant which Judge Harris adjudged to constitute contempt. The omission of such material from the Certificate gives or leaves the suggestion or impression, *if it does not overtly infer,* that appellant's remarks were directed, *and directed solely,* to the asking of the quoted question by Judge Harris.

Such was not the case. Indeed, appellant's remarks were directed more toward something else. *More toward a new and further act of misconduct on the part of Judge Harris than they were toward the asking of the quoted question.* They were directed more to-

*Inasmuch as it was a foregone conclusion that appellant would appeal to this court. Moreover, if such were the purpose of Judge Harris, then declaration was made in the certificate with the intention of thereby deceiving the members of this court and of inducing them to decide the appeal against appellant on an untrue factual basis.

ward certain statements made by Judge Harris between the asking of the quoted question and the quoted remarks of appellant, concerning which statements of Judge Harris the Certificate of Judge Harris makes no mention. This we will presently show.

FOUR.

Before doing so, however, let us pause to point out that even had the remarks of appellant been directed *solely* toward asking of the quoted question, they would have been *entirely justified.*

They would have been justified because the asking of the quoted question constituted misconduct on the part of Judge Harris. Misconduct amounting to criminal contempt of court. *For this, Judge Harris* should *have cited himself not only for misconduct, but for* criminal contempt of the tribunal over which he was then presiding. For this, Judge Harris should have been ashamed of himself.

FIVE.

But was appellant, at the time he made his remarks, sufficiently aware, from things which had already occurred, of Judge Harris' purpose in asking the quoted question, to give appellant justification for making those remarks?

He was.

A. Appellant knew that the quoted question had relevance only if it had relation to Father Meinecke's *mind* as distinguished from his *body.* Appellant knew

that the quoted question was in *continuation* of the four immediately preceding questions *and that each of those four questions had relation to Father Meinecke's* **mind** *as distinguished from his* **body.** Appellant sensed the implication in the word "**subjected**", and *knew* from that, that the quoted question had relation to Father Meinecke's **mind** *as distinguished from his* **body.** Appellant **knew** of the previous rulings of Judge Harris in the Crouch and Michener incidents and thus **knew** *that the quoted question was being asked* **in disregard and defiance of those previous rulings.** And appellant **knew** that during the course of the same trial Judge Harris had adjudged Vincent Hallinan **guilty of criminal contempt** of court for having assertedly asked questions *of a prosecution witness* **in disregard and defiance of previous rulings of Judge Harris.**

Here we need to shift to another of the converging avenues.

B. Just as Judge Harris' statement in his apology to the effect that the quoted question was "not born of curiosity on my part, but born of a desire to *provide* you with *all* of the *facts* surrounding the Father" intimated to the jury that Judge Harris had knowledge or information concerning what those facts were, so also the questions which Judge Harris asked Father Meinecke were in such terms and sequence as to convey to the jury (and to all spectators) that Judge Harris was not fishing in the dark or about matters concerning which he had no information but that he

knew what answers should be given, to be truthful, and that those answers, in some way, reflected upon the credibility of Father Meinecke.

The first question—the one about being subpoenaed—by hitting the nail squarely on the head, gave forth such an intimation. Then followed these questions and answers:

Q. Did you arrive here today, Father, this morning?

A. I came in yesterday.

Q. Have you had any discussions before taking your place on the witness stand with any persons?

A. Yes, I spoke to Mr. MacInnis. (4792)

Q. At his office?

A. Not at his office; at his home.

Q. At his home. When did you meet at his home, Father?

A. Last evening.

Q. Did you have dinner there at his home?

A. That is correct, * * *.

(R. 31.)

To all present who heard these questions and answers it became apparent that Judge Harris had foreknowledge (1) that Father Meinecke had arrived in San Francisco the day before, (2) that he had met appellant not at his office but at his home, (3) that he had met appellant in the evening rather than in the daytime, and (4) that he had had dinner in appellant's home. The fact that Judge Harris had elicited these matters so quickly, so unerringly and

with so little lost motion, negatived the thought that he had been fishing in unseen waters.*

Next we come to the series of five questions, hereinbefore set out, about memory, orientation and medical treatment. The very form of the two questions: "In San Francisco, Father, you were perfectly conversant and well oriented, *weren't you,* with respect to dates and the like?," and "Since you went to Nevada your orientation *has* become poor, has it?", indicated that Judge Harris knew that each should be answered in the affirmative, while the injection of the word "oriented" in the one and the word "orientation" in the other contain the same suggestion.

In this connection it should be realized that Judge Harris' departure, *in this one instance,* from his prac-

---

*The next question asked by Judge Harris,

"* * * After you *spent the evening there and enjoyed the social activities,* then you had a discussion concerning the testimony that might be given in this case?" (R. 32),

indicated what purpose Judge Harris had in mind in asking this series of questions. It was to show the jury that appellant and Father Meinecke had a relationship other than that of attorney and witness; a *social or fraternal* relationship—a friendship such as Father Meinecke had testified he had with Bridges—and *that, figuratively speaking, Bridges, appellant and Father Meinecke were as three cards out of the same deck, having different faces but the same back, substance and texture. In other words, it was to suggest that Father Meinecke was something less than a free, independent, and responsible witness and that, while the* **voice was his, the words were appellant's** *and* **the testimony was that of Bridges himself.**

[As a matter of fact, Father Meinecke performed the marriage of appellant and his wife and baptized each of their three children; and appellant and Bridges were barely acquainted prior to the filing of the indictment. While these facts do not appear of record we deem it permissible to mention them in this footnote to show that there was no basis in fact for the suggestion given forth by Judge Harris by this series of questions.]

tice of *not* cross questioning witnesses (R. 22), was, *in and of itself,* an event charged with the *excitement of anticipation,* the anticipation being that exciting facts, bearing on the credibility of Father Meinecke, *were about to be disclosed.*

This *suggestion of foreknowledge* was insidious in the extreme. It made the quoted question, "Have you been recently subjected to medical treatment, Father?", at once both a *rapier* and a *bludgeon.* A *rapier* if it brought forth an affirmative answer; a *bludgeon* (of unsworn testimony by Judge Harris) if it did not.

This is how appellant regarded that question. This is how appellant was entitled, in reason, to regard that question.

C. Appellant's judgment concerning the purpose of Judge Harris in asking the quoted question finds support in this further circumstance:

The incident in this case—commencing when Father Meinecke began his testimony and ending when Judge Harris concluded his apology to the jury—amounts to approximately *one, two hundred fiftieths* of the trial record of the Bridges case. As the Crouch and Michener rulings indicate, and as anyone with the least bit of acumen would naturally assume, a judge who went so far out in attempting to aid the prosecution and injure the defense as Judge Harris did in this incident was not likely to have displayed strict judicial impartiality throughout the other *two hundred forty-nine, two hundred fiftieths* of the trial. Appel-

lant did not have to make any such assumption. He knew what Judge Harris' conduct had been during the preceding stages of the trial. As a result, appellant did not have to be either clairvoyant or prescient to make a quick and accurate judgment concerning what Judge Harris' purpose was in asking Father Meinecke the question, "Have you been recently subjected to medical treatment, Father?" Appellant would have had to have been completely void of sense and sensibility, and of memory and comprehension, not to have made a quick and accurate judgment concerning that purpose. In this connection it is interesting to note that, to appellant, Judge Harris' apology came as an *anti-climax,* as is clearly indicated by the fact that appellant, in voicing objection to that apology after it was made, could find nothing stronger to say than that it had "the total effect of adding injury to injury" and that "the explanatory remarks are *at least* partially *as improper* as the ones originally made." (R. 59.)

We have shown (we believe) to the point where this Court will be entirely satisfied, that even had the remarks of appellant been directed solely toward the asking of the quoted question they would have been *entirely justified,* by the matters *then known* to appellant.

THREE (Continued)

As we have hereinbefore stated, the remarks of appellant were not directed *solely* to the asking of the quoted question but *mainly* to conduct of Judge Harris subsequent to the asking of that question.

Now let us see what occurred between the asking of the quoted question by Judge Harris, and the making of the remarks by appellant which Judge Harris adjudged to constitute contempt. The record in this respect reads as follows:

"Q. Have you been recently subjected to medical treatment, Father?

Mr. Hallinan. If the Court please, I am going to object to these questions.

Mr. MacInnis. Let me in.

Mr. Hallinan. I want to enter a legal objection. Your (4794) Honor has seen the Manning Johnsons, the *Crouches,* the Rosses, and everybody get on that stand and we asked *whether they were insane or not.* I object to your Honor's question. *I object to that last question* and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of *the question.*

The Court. There is no occasion for any admonition to the Jury. *Mr. MacInnis invited it.*

Mr. MacInnis. *I never heard of such a question.*

The Court. *Mr. MacInnis invited me to ask* the *question.*

Mr. MacInnis. Your Honor refused to do that and I asked a question.

The Court. I have the greatest respect for men of the cloth, as we all have.

Mr. MacInnis. You are demonstrating it.

The Court. There is no impropriety in my questioning.

Mr. MacInnis. I say there is.

The Court. He asserted his present memory is not good. I asked him whether or not his

recollection was good while he was here years ago. He said yes, it was good years ago. I don't see any reason for the criticism.

Mr. MacInnis. When one of the prosecution witnesses was on the stand we asked him if he had received medical treatment, and now you ask a priest who comes here and gives testimony the same question. (4795.)

The Court. Ladies and gentlemen——

Mr. MacInnis. I think you should cite yourself for misconduct.

The Court. Ladies and gentlemen——

Mr. MacInnis. I have never heard anything like that. You ought to be ashamed of yourself.

Mr. Donohue. If your Honor please, could I ask your Honor to recess at this time and ask the Father to remain until after the recess period?"*

(R. 33-34.)

It will be observed from the context and sequence of what occurred that appellant's remarks were directed more to the statement of Judge Harris that appellant had invited Judge Harris to ask the quoted question than they were to the asking of that question. The following two statements of appellant reveal that this is so. "I have never heard of such a question," and "I have never heard anything like that."

---

*By this "**timely**" motion for a recess, Mr. Donohue revealed that he realized that, in the exchange with appellant, Judge Harris was getting himself farther and farther out on a limb and that appellant was sawing deeper and deeper into that limb where it joined the trunk.

The statement of Judge Harris that appellant had invited him to ask "the question" was **absolutely false.** *Even worse still:* although absolutely false, *the circumstances were such that, in all probability, it appeared to the jury to be a truthful statement.*

Here it becomes necessary for us to explore another of the converging avenues.

At one point during the examination of Father Meinecke, Mr. Donohue, the Chief Prosecutor, moved the Court to strike the testimony of the priest on the ground that his testimony concerned his own personal opinion of Bridges, and not the general reputation of Bridges, *and hence was legally inadmissible.* In replying to that motion, appellant made this statement:

> "* * * I will invite your Honor to ask the witness if the answer he gives is not a composite of his own knowledge of the man plus what other people in the community have said."*
> (R. 21.)

That was the *only invitation* extended by appellant to Judge Harris to question Father Meinecke.

Judge Harris replied to this invitation as follows: "Mr. MacInnis, you are counsel for several of the defendants. You may ask him that if you are so advised." (R. 21.) " * * It is not the province of the court to examine the witness. You ask the questions if you like." (R. 22.) It is revealingly interesting to observe that when invited by appellant to ask this question, the asking of which by Judge Harris would have been of benefit to the defense, Judge Harris refused, but that as soon as Mr. Donohue said: "I have no further questions of the witness", Judge Harris said: "One question, Father Meinecke" (R. 31) and then proceeded to question the priest on behalf of the prosecution in the way hereinbefore exposed.

It was **not** an invitation to question Father Meinecke *about his health,* **whether physical or mental.** It was **not** even an invitation to question Father Meinecke **generally.** It was an invitation to put a single question to Father Meinecke on a limited, specific, defined subject *which had no relation to the subject of Father Meinecke's bodily or mental health.*

In all probability, the jury remembered the incident of this invitation, but did not remember, or even at the time the invitation was extended did not realize, that it was limited to a single specific defined subject matter. It is for this reason that we say that the circumstances were such that, in all probability, the statement of Judge Harris that appellant had invited the quoted question about recent medical treatment *appeared to the jury to be a truthful statement, whereas, as a matter of record fact, it was absolutely false.*

Now let us ask why Judge Harris found it necessary or convenient to declare in the presence of the jury that appellant had invited the question. We think the reason and the purpose of Judge Harris in this respect is unmistakably apparent, viz.: (1) Judge Harris knew that by his previous rulings he had repeatedly prevented counsel for the defense from questioning prosecution witnesses concerning possible mental illness; (2) Judge Harris realized that in all probability the jury remembered that he had made such rulings; (3) The objection of Vincent Hallinan just then made recalled such rulings

to the jury's attention; (4) Thus Judge Harris found himself in an extremely embarrassing position with respect to the jury, that is, in the position of himself having asked of a defense witness a question of a character which he had theretofore repeatedly held to be improper when asked of prosecution witnesses; and (5) **That Judge Harris made the statement that appellant had invited the question in an attempt and for the purpose of saving his own face with the jury, that is, in an attempt to conceal from the jury the fact that he had asked the quoted question in disregard and defiance of his own previous ruling.**

Is there any other possible explanation which is in the least bit plausible? We can think of none. *And, again, we challenge the attorneys for the Government to suggest such an explanation if they can so much as imagine one.*

When Judge Harris declared that appellant had invited the question, he knew that that declaration was false. No matter how faulty his memory, Judge Harris could not have been mistaken in this respect. His memory might possibly have slipped a cog to the extent of remembering appellant's invitation as being an invitation to question Father Meinecke generally, but it could not have stripped its gears completely, that is, to the extent of remembering appellant's invitation as being one *to ask the Father about his mental or physical well-being.*

And note this: Judge Harris first said "Mr. MacInnis invited it"; appellant then said *"I never heard of* such a question"; and Judge Harris then in response to appellant's specific disavowal, declared:

"Mr. MacInnis invited me to ask the *question."*

"* * * the question".

Not *"questions."* Not *"a question."* but

"* * * the question".

SIX.

What was appellant to think when suddenly confronted with this falsehood, coupled with this attempt to shift the blame from Judge Harris, on whom it belonged, to and upon appellant, upon whom it did not belong?

What was appellant to do? What was he to say in an attempt both to save the record and to reveal to the jury that such declaration and accusation by Judge Harris was untrue? What was appellant to do to save both the record for appeal and at the same time to save his clients from the injury which they would suffer in the minds of the jury should such falsehood and false accusation go unchallenged?

Appellant had no time to study the matter. He had no time to reflect, or to analyze, or to deliberate, or to choose carefully his words. He had to act immediately. He had to grasp and utter the thoughts and words which first came into his mind. He had to repel at once this flank attack—indeed, he had to

repel at once this two pronged stiletto attack from his rear.

That Judge Harris should have cited himself for misconduct for attempting to foist this falsehood upon the jury is manifest. That he should have been ashamed of himself for so doing is also and equally manifest. His act was that of an unfair judge covertly acting as a prosecutor. His act was that of attempting to influence the jury against the defendants, and thereby procure their conviction, and then, when his devious design was about to be exposed, of foisting a deliberate falsehood upon the jury in an attempt to block and smother such a disclosure. We repeat, Judge Harris should have cited himself for misconduct. Indeed, he should have cited himself for criminal contempt of Court. And he should have been ashamed of himself.

SEVEN.

But should appellant have declared these two things in the presence of the jury? Should he have been content to make merely a formal assignment of misconduct to preserve the record for appeal, thereby permitting the nefarious purpose of Judge Harris to succeed? Or should appellant have attempted, as he did attempt, albeit ineffectively, to prevent the weight of the District Court of the United States from being thrown into the scales of justice against the defendants to procure their conviction at the hands of the jury?

Cooley in his work on Constitutional Limitations, Eighth Edition, in the chapter on Protection To Personal Liberty, says, on page 703:

> "Having once engaged in a cause, the counsel is not afterwards at liberty to withdraw from it without the consent of his client and of the court; and even though he may be impressed with a belief in his client's guilt, it will nevertheless be his duty to see that a conviction is not secured contrary to the law. The worst criminal is entitled to be judged by the laws; and if his conviction is secured by a means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether."

To such text there is added this footnote:

> "There may be cases in which it will become the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client; but these cases are so rare, that doubtless they will stand out in judicial history as notable exceptions to the ready obedience which the bar should yield to the authority of the court."

The footnote continues much beyond the point which we have quoted, setting forth an example of justifiable defiance of Court by counsel, by Lord Erskine, the famous English barrister, and making reference to a similar justifiable defiance of Court by counsel, by Mr. Samuel Dexter, the celebrated Ameri-

can counsel, as set forth in Story on the Constitution (4th Ed.) p. 1064. But we have quoted enough from Cooley to make our point. It is this: **if ever there were an instance where it became "the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client", such an instance was present in this case in this instance.**

Appellant attempted to discharge precisely that duty. It is true that he did so more with courage than effect. It is true that in appellant's hurried statements he *accused* Judge Harris rather than *revealed* Judge Harris' fault. Perhaps, had the exchange between Judge Harris and appellant not been interrupted so quickly by Mr. Donohue's motion for a recess **(which was grasped with great alacrity by Judge Harris)**, appellant would have succeeded in passing from accusation to revelation.*

It is because, and solely because appellant rightfully and properly attempted to discharge this duty, that he was adjudged guilty of criminal contempt of Court, and was sentenced to three months in prison.

---

*It so happens that appellant's statements did have effect in so far as preserving a record on appeal in the *Bridges* case was concerned, for his statements had the effect of inducing Judge Harris to make an apology to the jury, in which apology he unmistakably revealed nefarious purposes which this Court would not have attributed to any U. S. District Judge, in the absence of such a disclosure of such purposes as Judge Harris made in his apology to the jury.

The punishment is being visited upon appellant not because of any wrongdoing on his part, but because he had the courage to attempt immediately to expose the wrongdoing of Judge Harris so that his clients should not be wrongfully and unfairly convicted.

EIGHT.

Before concluding our argument on this point, we wish to make a personal statement. We regret that we have found it necessary to say the things which we have said against one who occupies one of the highest offices in the Government of our nation. We would not have said such things (in this tribunal as distinguished from the tribunals in which impeachments of Federal officers are brought and tried) had we not thought it necessary for us to do so to adequately present the defense which appellant has. Nor would we have made the charges which we have made had there been any vestige of doubt in our mind on either of two things, viz.: (1) that the charges were in fact true, and (2) that their truth clearly and unmistakably appeared in the record.

Our task has been an unpleasant one. And it has been a difficult one in that we have redrafted the foregoing argument time after time, in an attempt to be moderate without weakening appellant's defense. But the more we labored, the more we came to the conviction that the argument which we have made should be made in order to make crystal clear and diamond sharp the fact, the nature, and the

extent of appellant's justification. We regret we present such issue for this Court's consideration and determination. But that issue has not been of our making: it was presented to us by Judge Harris. We have had no alternative but to face it and to pass it along to this Court.

To state this matter in another way: we find ourselves in the position of a physician who, in order to save his patient, must cut open, and probe, and excise, a foul and festering wound inflicted upon him by another. We have performed such an operation in this brief, not because we have found it pleasant to do so, but because we have found it necessary and our duty to do so.

It is not our desire to give offense or to be offensive. It is our purpose to defend—to present the defense which appellant has—and to do so as forcefully and as convincingly as lies within our skill, employing only the ammunition which Judge Harris has placed within our reach.

NINE.

In concluding our argument on this point, permit us to express our conviction that appellant is entitled not only to a reversal of the judgment and sentence but to vindication, and that vindication will not be his if the judgment and sentence are reversed solely on one or more points of jurisdiction and procedure. Calumny is difficult to combat and it has a propensity to grow and increase until it is turned back upon itself; aye, even after it is turned back upon itself.

Appellant has suffered, in his practice and in his social relations and in other ways, as a result of the calumny placed upon him by the present judgment. He is entitled, in fairness and justice, to all the relief which this Court can give him. He is entitled to a decision in which his justification is fully stated.

APPELLANT'S SECOND, THIRD, FOURTH, AND FIFTH POINTS.

SECOND. THAT THE DISTRICT COURT LOST AUTHORITY AND JURISDICTION TO PUNISH APPELLANT UNDER RULE 42(a), FEDERAL RULES OF CRIMINAL PROCEDURE, BEFORE, AND LONG BEFORE, IT UNDERTOOK TO IMPOSE PUNISHMENT UPON APPELLANT.

THIRD. THAT BECAUSE THE DISTRICT JUDGE DID NOT CERTIFY THAT THE CONDUCT OF APPELLANT DISRUPTED, THREATENED TO DISRUPT OR TENDED TO DISRUPT, OR, EVEN, WAS INTENDED TO DISRUPT THE ORDERLY PROCESS OF THE COURT, THE DISTRICT JUDGE DID NOT HAVE AUTHORITY OR JURISDICTION TO "SUMMARILY PUNISH" APPELLANT UNDER RULE 42.

FOURTH. THAT THE RECORD OF THE PROCEEDINGS AT THE TIME OF THE PRONOUNCEMENT OF SENTENCE AND JUDGMENT SHOW THAT THE SENTENCE OF THREE MONTHS' IMPRISONMENT WAS IMPOSED NOT SOLELY BECAUSE OF THE ALLEGED ACTS OF CONTEMPT RECITED IN THE CERTIFICATE BUT WAS IMPOSED IN INSEVERABLE PART AS PUNISHMENT FOR UNIDENTIFIED AND UNSPECIFIED ACTS OF APPELLANT CONCERNING WHICH NO CERTIFICATE IN CONFORMITY WITH RULE 42(a), FEDERAL RULES OF CRIMINAL PROCEDURE, WAS MADE OR FILED AND THAT THE DISTRICT COURT HAD NO AUTHORITY OR JURISDICTION TO IMPOSE A PUNISHMENT ON APPELLANT UNDER RULE 42(a) AFORESAID WHICH WAS, EITHER IN ITS ENTIRETY OR IN INSEVERABLE PART, FOR ACTS CONCERNING WHICH NO CERTIFICATE IN CONFORMITY WITH RULE 42(a) AFORESAID HAD BEEN MADE AND FILED.

FIFTH. THAT THE SENTENCE OF THREE MONTHS' IMPRISONMENT IS EXCESSIVE.

[To avoid repetition of argument and of quotations of authority we herewith combine our discussion of points two to five inclusive. We do so without waiving any point for we feel that each one in and of itself is sufficient to require a reversal.]

The Supreme Court in

In re Oliver, 333 U.S. 257

decided March 8, 1948, said, on page 275:

> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, *and where* **immediate** *punishment is* **essential** *to prevent 'demoralization of the court's authority' before the public."*

Let us repeat: "* * * and where **immediate** punishment **is essential** to prevent 'demoralization of the court's authority' before the public."

In the case of

Cooke v. United States, 267 U.S. 517

decided April 13, 1925, the Supreme Court on pages 534 and 535 said:

> "To preserve order in the court room for the proper conduct of business, *the court* **must** *act* **instantly** to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need

of evidence or assistance of counsel before punishment, because the court has seen the offense. Such *summary* vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry,* 128 U.S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, *immediately* proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law."

On page 536 the Supreme Court said:

"We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice," as Blackstone has it, is not **instantly suppressed and punished,** demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the **need** for **immediate penal vindication** of the dignity of the court **created it.**"

And on page 537 the Supreme Court said:

> "The proceeding in this case was not conducted in accordance with the foregoing principles. We have set out at great length in the statement which precedes this opinion the substance of what took place before, at and after the sentence. The first step by the court was an order of attachment and the arrest of the petitioner. It is not shown that the writ of attachment contained a copy of the order of the court, and we are not advised that the petitioner had an exact idea of the purport of the charges until the order was read. In such a case, and **after so long a delay**, it would seem to have been proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged. See Hollingsworth v. Duane, 12 Fed. Cases 367, 369. Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest."

The "so long" delay in the *Cooke* case was one of **eleven days** (Ibid p. 521) as contrasted with the delay in this case of **twenty-eight days** before Judge Harris adjudged appellant to be guilty of contempt and of **sixty-two days** before Judge Harris **imposed punishment.**

Rule 42 Federal Rules of Criminal Procedure (prescribed under authority of Act of November 21, 1941, C 492, 18 U.S.C.A. Sec. 689, and therefore having the effect of a statute) reads as follows:

"**Rule 42. Criminal Contempt**

"**(a) Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"**(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

The note of the Advisory Committee on Rules for subdivision (a) of this rule reads as follows:

"This rule is substantially a restatement of existing law. Ex parte Terry, 128 U.S. 289; Cooke v.

United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 769."

The phrase "**punished summarily**" in subdivision (a) of this rule unquestionably has relation to the phrase "**Such summary vindication**" appearing on page 534 of the *Cooke* case, and, thus, to the clauses "the court must act **instantly**" and "**immediately** proceed to determine whether the facts justified punishment **and to inflict such punishment** * * *," contained in the same paragraph.

In this connection, the word summary has two connotations. One is: without formality. The other is: **immediately, without delay.** See **any** dictionary.

As we have shown, it is **only** the **need** for **immediate** action which empowers a Court to proceed without the formalities of notice and hearing in any matter of contempt. Where such a **need** does not exist, either because the contempt does not disrupt or tend to disrupt the orderly process of the court **or because of lapse of time,** the power to proceed without the formalities of notice and hearing **does not exist.**

To say this in a more graphic way: the power to punish summarily for contempt may be likened to a short whip the sole function of which is to enable the Court to repeal and subdue assaults upon its dignity and orderly procedure which are at once **both** immediate in point of time and at close range in point of space. When an assault is not at close range in point of space (that is where it is indirect) there is no **need**

for such a power, for the long whip of notice and hearing is fully capable and better suited to repel and subdue it. Similarly when an assault is not immediate in point of time there is no need for such a power, for, again and equally, the long whip of notice and hearing is fully capable and better suited to repel and subdue it. The "due process" clauses of the Constitution of the United States preclude the use of the short whip where the need for its use either has not come into existence or, having come into existence, has ceased to exist as the result of cessation of the attack and failure to use it while the attack was still in progress or so recently in progress as to be deemed still in progress.

This brings us to a consideration of certain thoughts expressed by Mr. Justice Holmes in his dissenting opinion in the case of

Toledo Newspaper Co. v. U. S., 247 U.S. 402.

We feel free to quote these thoughts of Mr. Justice Holmes as judicial authority for the reason that the majority opinion in that case was later overruled by the Supreme Court in the case of *Nye v. U. S.*, 313 U.S. 33 (on page 52) and because the Supreme Court in the latter case, cited the dissent of Mr. Justice Holmes as reason in support of its decision (on pages 51 and 52).

In his dissent in the *Toledo Newspaper Co.* case, Justice Holmes said, on page 423:

> "* * * When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter

which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their presence' as is stated in Ex parte Robinson, 19 Wall. 505. See Prynne, Plea for the Lords, 309, cited in McIlwain, The High Court of Parliament and its Supremacy, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point and point only to **the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity**—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months as the Court did in this case. Without invoking the rule of strict construction I think that 'so near as to obstruct' means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. 'So near as to' refers to an accomplished fact, and the word 'misbehavior' strengthens the construction I adopt. **Misbehavior means something more than adverse comment or disrespect.**"

And on pages 425 and 426 Mr. Justice Holmes concluded:

"* * * I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, **but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts. Action like the present in my opinion is wholly unwarranted by even color of law.**"

The punishment imposed by Judge Harris on appellant in this case, being imposed at the time it was imposed, **manifestly amounted to "postponed retribution for lack of respect for" the dignity of Judge Harris** and/or the Court over which he was presiding **and was not imposed for "the present protection of the court from actual interference."**

Were there any room for doubt on this score it is completely removed by what Judge Harris said at the time of pronouncing sentence on appellant.

The following appears on pages 82 to 84 of the record:

"Tuesday, April 4, 1950

Verdict

* * *

The Clerk: April 10.

The Court: That is all with respect to the defendants. They may be seated.

Mr. Hallinan: Yes, your Honor.

The Court: Now I have several matters affecting counsel. *I might ask counsel to permit me without interruption to say what I have to say, and hereafter, at the conclusion, you may interpose whatever legal motion you may desire, or any individual request on your own behalf, or either of your behalves.* I suggest you remain seated, counsel, if you wish.

I approach these matters affecting the attorneys with considerable diffidence and no amount of reservation. For when I deal with the attorneys, I deal with officers of this court. I desire to address myself briefly to Mr. Hallinan *and Mr.*

MacInnis. And I say to you that from the beginning of this trial you have embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial.

That such was your purpose has been entirely manifest to me. Such conduct is not alone an affront to the dignity of the Judiciary of the United States, it is an affront to the dignity, good name and honor of a great profession. I said to *you,* and I repeat, that members of the bar are officers of the court. My experience has demonstrated that a vast majority of lawyers, in and out of court, conduct themselves with propriety, integrity, dignity and honor.

Your assault on this Court cannot go unchallenged, and I am determined, so far as I am able, in my humble capacity, that such behavior as displayed by you shall not be repeated in other Federal courtrooms. America is justifiably proud of its judicial system, and anyone who attempts to degrade it or weaken it is working an injustice.

With regard to you, Mr. Hallinan, I retrace my steps momentarily to remind you that on the 22nd of November, 1949, the Court adjudged you guilty of criminal contempt, and thereafter regularly filed a certificate under the provisions of Rule 42(a) of the Rules of Criminal Procedure. Thereafter, upon the request of your client, Mr. Harry Bridges, I permitted you to remain as counsel in the case and granted a stay of execution until termination of the trial.

The consent of the Court was obtained upon the belief, reliance and understanding that there would not be a repetition of such conduct. Un-

fortunately, within a comparatively brief period you deliberately launched into a series of acts and conduct again resulting in criminal contempt, which I have more particularly found and specified in a certificate. During the course of the trial and since the first adjudication, you have, as a pattern of deliberate misconduct and in flagrant contempt of this Court, the dignity thereof and the respect due to it, sought to and did malign and abuse Government witnesses, attorneys and agents in a loud, contemptible manner. It is difficult to portray by written word your intonation, gestures and deportment, as well as the belligerent tone, mode and manner created. It is difficult to portray by the written word the loud language used by you and the contemptible language used by you, both in and out of the presence of the jury; all of which conduct was designed to bring into disrepute this Federal Court, as well as the judge thereof, charged with the administration of justice.

Accordingly, I specifically find that you, Vincent Hallinan, have been and you are now guilty of contemptuous conduct and misbehavior in the presence of the Court, in the particulars specified in the certificate which I have filed herein; thus obstructing the administration of justice. I therefore adjudge that you have been guilty of contempt of this Court for such conduct in the course of this judicial proceeding. It is adjudged that Mr. Vincent Hallinan is to serve six months in an institution to be designated by the United States Attorney General or his authorized representative, said sentence, however, to run concurrently with the previous judgment and sentence heretofore regularly made and entered on or about the 22nd day of November, 1949.

There then followed statements by Judge Harris and Vincent Hallinan with respect to the sentence of Vincent Hallinan following which Judge Harris, returning to the matter of appellant, said, on pages 87 and 88 of the Record:

> With regard to James Martin MacInnis, this Court heretofore, and on the 28th day of February, 1950, regularly adjudged James Martin MacInnis guilty of contempt of this Court. The matter of judgment and sentence having been stayed and deferred until the completion and conclusion of the trial, and the trial having been concluded and terminated, now said James Martin MacInnis is sentenced to serve three months in an institution to be designated by the United States Attorney General or his authorized representative. *Although, in my opinion, Mr. MacInnis' contemptuous conduct was just as studied* and flagrant as that of Mr. Hallinan, nevertheless I feel he is entitled to a lesser sentence, for the reason that he appears to have been, to some extent at least, inspired by his senior colleague, Mr. Hallinan.*

From the foregoing it is manifest that the sentence on appellant was imposed not only as "**postponed retribution for lack of respect for**" **the dignity of Judge Harris** and/or the Court over which he was presiding **but was imposed, in inseverable part, for acts of appellant "from the beginning of the trial,"—and inferentially to its end—concerning which no mention is made in the one and only certificate filed by Judge Harris and concerning which Judge Harris at**

*The remarks of appellant set forth in the certificate could not have been studied for they were in immediate response to conduct of Judge Harris which no one could have anticipated.

no time adjudged appellant to be in contempt of court.

This fact alone—that is the fact that Judge Harris, in sentencing appellant, revealed that the punishment was imposed not only for the single act for which appellant had been adjudged in contempt of Court and which was recited in the certificate but also for other acts of appellant concerning which there had been no such adjudgment and which were unidentified in any way—necessitates a reversal of this case on the authority of *Cooke v. United States, supra,* as is evident from the following holding appearing on page 538, viz.:

> "* * * On the other hand, *when the Court came to pronounce sentence,* it *commented* on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and in employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client. When Walker questioned this, the court directed the marshal to prevent further interruption. **It was quite clear that the court considered the facts thus announced as in aggravation of the contempt.** Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet or explain them, before the sentence. **We think the procedure pursued was unfair and oppressive to the petitioner.**"

We next take up the matter of no statement in the Certificate of Judge Harris that the conduct of appellant disrupted, threatened to disrupt or even was intended to disrupt the orderly process of the Court. *The fact that Judge Harris delayed 28 days before adjudging appellant guilty of contempt and delayed 62 days before imposing punishment, reveals that Judge Harris, himself, did not regard the conduct of appellant to be of such character as to necessitate immediate imposition of punishment in order to preserve the orderly process of the Court,* and, in the absence of a recitation in the Certificate that the conduct of appellant was such as to disrupt or to threaten to disrupt or to tend to disrupt the orderly process of the Court, *no proper occasion for the exercise of power under Rule 42(a) Federal Rules of Criminal Procedure, appears.*

In this connection the following portion of the decision in *Cooke v. U. S.,* supra (at page 539) is particularly pertinent:

> "Another feature of this case seems to call for remark. The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed *to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal,* but he should not

bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that **where conditions do not make it impracticable,** or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

From this it follows that the imposing of punishment on appellant, **having been so long delayed, it was not "impracticable"** for Judge Harris to have asked "one of his fellow judges" to pass upon the matter. Inasmuch as the conduct of appellant cited in the certificate of Judge Harris consisted **in its entirety** of a "personal criticism or attack upon" Judge Harris himself, it was his duty, under the foregoing pronouncement of the Supreme Court, as since given the force of statute in subdivision (b) of Rule 42, Federal Rules of Criminal Procedure, to proceed under that subdivision of the rule and, in so doing, **disqualify** himself "from presiding at the trial or hearing", and, by so doing, **"banish the slightest personal impulse to reprisal" and "avoid arbitrary or oppressive action."**

Instead of doing these things Judge Harris did the very things which the Supreme Court **condemned** in the *Cooke* case, with the result we submit, that the sentence imposed by Judge Harris on appellant is obviously **"arbitrary and oppressive"** and, as obviously, an act of **"personal * * * reprisal"** by Judge Harris.

CONCLUSION.

We respectfully submit that for the reasons, and for each and every one of the reasons, hereinbefore given, the judgment should be reversed.

Dated, San Francisco,
January 8, 1951.

Respectfully submitted,
WILLIAM F. CLEARY,
Attorney for Appellant.